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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MID-WILSHIRE PROPERTY L.P. et al.,	
Plaintiffs and Appellants,	G055088
v.	(Super. Ct. No. 30-2015-00801555)
LIDO HOLDING COMPANY LLC et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Enenstein Pham & Glass, Teri T. Pham and Tony J. Cheng for Plaintiffs and Appellants.

Burke, Williams & Sorensen, Mark J. Mulkerin and Stephen A. McEwen for Defendant and Respondent Lido Holding Company LLC.

INTRODUCTION

Mid-Wilshire Property, L.P. (the Partnership), and Mid-Wilshire Health Care Center, Inc. (Health Care Center), are the landlord and tenant, respectively, of a commercial property in Tustin (the Tustin property). The Tustin property was foreclosed upon at the end of a complicated series of financial transactions, and the Partnership and Health Care Center sued the foreclosing entity, respondent Dr. Leevil, LLC (Leevil), and the subsequent purchaser, respondent Lido Holding Company, LLC (Lido), for wrongful foreclosure and quiet title.

Leevil and Lido moved for summary judgment against both the Partnership and the Health Care Center. The trial court denied Lido's motion as to the Partnership and granted the motion as to Health Care Center, finding that Health Care Center, as a tenant, lacked standing to sue. The trial court entered judgment against Health Care Center only. Health Care Center has appealed from the judgment.

Under the circumstances of this case, the judgment is premature. Both Health Care Center and Lido are still in the case, as both parties still have claims unresolved as to them. The rationale for entering a separate judgment is absent here, and so it must be reversed.

FACTS

Health Care Center's lease on the Tustin property began in 2004 and was renewed in January 2008. In January 2008, the landlord (the Partnership) borrowed $4 million from Tomatobank, N.A., securing the loan with a deed of trust on the Tustin property. In July 2008, the Partnership borrowed an additional $9 million from Tomatobank, secured by a note and deed of trust on another piece of property in Westlake.

In September 2013, Health Care Center and Tomatobank entered into a subordination agreement, recorded on September 25, whereby Health Care Center agreed that its rights as a tenant were subordinate to Tomatobank's deed of trust on the Tustin

Property. The subordination agreement also contained attornment provisions, whereby Health Care Center would, in the event of foreclosure, recognize Tomatobank as its landlord.[1]

The Partnership defaulted on both loans in December 2013. In April 2014, Tomatobank filed suit in Ventura County Superior Court for judicial foreclosure on both loans. In July 2014, while the judicial foreclosure suit was still pending, Tomatobank assigned its interest in the two loans to Leevil. Leevil recorded a notice of default and then a notice of trustee's sale on the Tustin property.

Through a nonjudicial foreclosure sale, Leevil sold the property in Westlake for more than the debt. The balance of the sale proceeds was applied to the loan on the Tustin property. Thus, according to Health Care Center and the Partnership, both debts were entirely paid off.

Leevil, however, claimed more money was owing on the Tustin note, and it proceeded to foreclose on the Tustin property. Lido purchased the Tustin property at the trustee's sale. Lido then served a three-day notice to quit on tenant Health Care Center.

The Partnership and Health Care Center sued Leevil for wrongful foreclosure, an accounting, quiet title, and cancelation of the trustee's sale and trustee's deed. Both plaintiffs sued Lido for an accounting, quiet title, and cancelation of the trustee's sale and trustee's deed. After the court sustained a demurrer, the cause of action for an accounting was dismissed as to Lido.

Leevil and Lido each moved for summary judgment or summary adjudication.[2] The trial court denied Leevil's motion, but granted Lido's motion in part. The court found triable issues of material fact as to whether the two loans had indeed

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[1] "Attornment" means that "[t]he tenant has agreed, or will agree, to recognize his landlord's successor in interest as his new landlord." (*Vallely Investments v. BancAmerica Commercial Corp.* (2001) 88 Cal.App.4th 816, 824, fn. 3.)

[2] The Partnership and Health Care Center also moved for summary judgment, which motion was denied.

been paid off, as the Partnership and Health Care Center had alleged, or whether money was still owing on the first loan, as Leevil and Lido claimed. But it found that Health Care Center, as a tenant, did not have standing to bring claims based on wrongful foreclosure and quiet title against Lido because it had subordinated its lease to the note and deed of trust. The trial court entered judgment in favor of Lido and against Health Care Center on April 19, 2017.[3]

As of the entry of judgment in Lido's favor, the causes of action in the first amended complaint stood as follows: first cause of action (wrongful foreclosure) both plaintiffs versus Leevil; second cause of action (set-aside of trustee's sale) both plaintiffs versus Leevil, the Partnership only versus Lido; third cause of action (cancel trustee's deed) both plaintiffs versus Leevil, the Partnership only versus Lido; fourth cause of action (quiet title) both plaintiffs versus Leevil, the Partnership only versus Lido; fifth cause of action (accounting) Partnership only versus Leevil only.

DISCUSSION

An appeal must be taken from a final judgment or an appealable order. (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660-663; [prematurely entered summary judgment voidable]; Code Civ. Proc., § 904.1.)[4] We conclude that the "judgment" in this case was improperly entered because it was not "the final determination of the rights of the parties in an action or proceeding." (§ 577.)

In this case, two plaintiffs sued two defendants. The trial court granted summary judgment as to one defendant, Lido, against one plaintiff, Health Care Center. It denied Lido's summary judgment motion against the other plaintiff, the Partnership.

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[3] Health Care Center's notice of appeal identified the order or judgment appealed from as one under Code of Civil Procedure section 904.1, subdivisions (a)(3)-(13) and the date of the order as April 28, 2017. According to the register of actions, the only document filed on April 28 was Lido's notice of entry of judgment, which is not appealable. The appeal was actually from a judgment after an order granting a summary judgment motion, filed on April 19. We deem the appeal as being from the April 19 judgment. (See *Luz v. Lopes* (1960) 55 Cal.2d 54, 59-60; *Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 251; Cal. Rules of Court, rule 8.100(a)(2).)

[4] All further statutory references are to the Code of Civil Procedure.

As a result, both Lido and Health Care Center are still in the case, just not against each other. Health Care Center is still a plaintiff in the causes of action one through four against Leevil, and Lido is still a defendant in the second, third, and fourth causes of action.

Section 578 provides, "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." Section 579 provides, "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." Although the language of this latter statute is limited to a judgment *against* one of several defendants, the statute has been held to apply to a judgment *in favor of* one of several defendants. (See *Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 578 (*Oakland Raiders*).)

The parties have not directed us to a case dealing with this configuration of plaintiffs, defendants, and causes of action, and we have not located any such case. In all the cases presented to us or that we have independently reviewed on this issue, the judgment appealed from took one party entirely out of the case. (See, e.g., *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 819-821, and fn. 3, overruled on other grounds in *Della Penna v. Toyota Motor Sales, U.S.A.* (1995) 11 Cal.4th 376; *Wilson v. Sharp* (1954) 42 Cal.2d 675, 677; *Aetna Casualty & Sur. Co. v. Pacific Gas & Elec. Co.* (1953) 41 Cal.2d 785, 788-789 [one defendant entirely out of case]; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437; *Oakland Raiders, supra,* 93 Cal.App.4th at p. 578; *South v. Wishard* (1956) 146 Cal.App.2d 276, 282; *Stafford v. Yerge* (1956) 139 Cal.App.2d 851, 853-854 and cases cited; *George v. Bekins Van & Storage Co.* (1948) 83 Cal.App.2d 478, 482 [judgment eliminated defendant from case]; *Weisz v. McKee* (1939) 31 Cal.App.2d

144, 147-148). If the judgment was upheld on appeal, that party had no further involvement with the court or the other parties.

That is not the situation here. In this case, one of two plaintiffs has been dismissed as to one of two defendants. But the rest of the case proceeds with *both* plaintiffs and *both* defendants still present and accounted for.

The rationale for considering a judgment final when it applies to fewer than all dismissed parties was explained in *Justus v. Atchison* (1977) 19 Cal.3d 564, disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159 (*Justus*). In *Justus*, two sets of parents sued an obstetrician and a hospital after their babies were stillborn, alleging several causes of action. (*Id.* at p. 567.) Both sets of parents attempted to state causes of action for wrongful death, and each husband attempted to state a cause of action for emotional distress. (*Justus, supra,* 19 Cal.3d at p. 567.) The trial court sustained several demurrers to these causes of action, finally without leave to amend. (*Id.* at p. 568.)

Our Supreme Court first had to decide whether the judgments were appealable, in that not all the causes of action had been dismissed, and the women were still in the case. The court decided that they were: "The judgments now before us disposed in each case of *all* the causes of action in which the *husbands are plaintiffs*. It is irrelevant that the wives joined with the husbands as plaintiffs in one of these causes of action. This circumstance does not affect the reason for the exception, i.e., that it better serves the interests of justice to afford prompt appellate review to a party whose rights or liabilities have been definitively adjudicated than to require him to await the final outcome of trial proceedings which are of no further concern to him. Here the plaintiff husbands have been excluded from any possibility of relief by the rulings complained of; the exception therefore governs, and the appeals will lie." (*Justus, supra,* 19 Cal.3d at p. 568 (italics added); see *Rocca v. Steinmetz* (1922) 189 Cal. 426, 428 ["[T]o hold the person bound to wait until the final judgment against the other party before taking an

appeal . . . is wholly unreasonable . . . . [S]uch a judgment is final within the meaning of that term . . . . No other judgment can be entered against him, as he will go free if the case goes no further against him."])

But under the circumstances before us, we believe the judgment is not final because it does not exclude plaintiff Health Care Center from "any possibility of relief"; "another judgment," in favor of the Partnership, "can be entered against" defendant Lido, which does not "go free." Lido's "rights and liabilities" have not been "definitively adjudicated." The final outcome of the proceeding is "of further concern" to Lido, because the Partnership is still suing it for cancelation of the sale and the trustee's deed and for quiet title. Likewise, both the Partnership and Health Care Center are suing Leevil for wrongful foreclosure, cancelation, and quiet title. The final outcome of trial proceedings are of further concern to both of them. Lido cannot wait passively for the proceedings between the plaintiffs and Leevil to conclude; it still has a battle to fight against the Partnership. But thanks to the ruling on its motion, it has only one adversary to vanquish, not two.

A somewhat similar situation was presented in *C3 Entertainment, Inc. v. Arthur J. Gallagher & Co*. (2005) 125 Cal.App.4th 1022 (*C3*). In that case, an insured company sued its insurance company and its broker when the insurance company denied coverage. When the trial court granted summary judgment in the insured's favor on duty to defend, the broker moved for summary judgment, since the basis of the claim against the broker was negligence in procuring a policy without a duty to defend. The trial court granted summary judgment to the broker and entered judgment in its favor. (*Id.* at pp. 1024-1025.)

The reviewing court dismissed the appeal as premature because it could not determine whether the broker was entitled to summary judgment without reviewing the

insurance company's motion, which had not been appealed.[5] (*C3, supra,* 125 Cal.App.4th at pp. 1025-1026.) In *Call v. Alcan Pacific Co.* (1967) 251 Cal.App.2d 442, the court determined that a judgment in favor of a surety on a single claim was premature when no judgment had been rendered as to the principal on the same claim. "Generally there can be only one final judgment between two parties or sets of parties in an action or proceeding." (*Id.* at p. 449.)

In this case, Health Care Center's claims against Leevil remain to be resolved, as do the Partnership's claims against Lido. Moreover, everyone is still arguing about the same piece of property. Everyone will eventually be back in court, and no one can bid farewell to counsel or to the drudgery of litigation. Under these circumstances, we conclude that the trial court should not have entered summary *judgment.*

It should be noted that Lido moved for summary *adjudication* of the second, third, and fourth causes of action on the basis of its affirmative defense of Health Care Center's lack of standing. Our holding today does not disturb the trial court's *order* adjudicating this affirmative defense. Under section 437c, subdivision (n)(1), Health Care Center's lack of standing is deemed established as to Lido, and "the action shall proceed as to the cause or causes of action, affirmative defense or defenses" of the Partnership, Health Care Center, Lido, and Leevil. (See *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1076 ["A successful motion for summary adjudication eliminates the need to prove or disprove a particular claim, leaving the remainder of the case to go to trial – after which one judgment is entered covering the issues decided in the motion and the trial."]) Lido does not have to defend itself against Health Care Center on the allegations of the second through fourth causes of action – only against the Partnership. When the entire action has been sorted out and a final judgment entered, an aggrieved party may file an appeal.

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[5] Other issues between the insured and the insurance company had to be resolved before a final judgment could be entered as to them.

DISPOSITION

The judgment is reversed. Appellant will recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

GOETHALS, J.